* Together with Scata v. United States

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 474

IRWIN GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported. It is printed in Appendix A hereto, infra, at page App. 1.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was made and entered on July 5,

1967. A copy is annexed to this petition in Appendix A. The jurisdiction of the Court is invoked under 28 U.S.C.A., §1254(1).

QUESTION PRESENTED

Where several Counts of a Grand Jury Indictment charge the petitioner pursuant to 18 U.S.C.A., §152, with the same offense of concealing various types of property subsequent to a given date, are such counts defective and subject to dismissal.

STATEMENT

Petitioner, IRWIN GORDON, was charged under an eight-count Indictment in violation of 18 U.S.C.C. §152 (Appendix C).

Petitioner challenged the sufficiency of the Indictment and requested a bill of particulars. Although Respondent agreed to provide better particulars, Respondent did not comply with its agreement. Thereupon, Petitioner moved for dismissal of the Indictment due to non-compliance of the Government with its aforesaid agreement. On October 26, 1965, the trial Judge entered an Order denying Petitioner's motion to dismiss.

Petitioner entered a plea of not guilty and demanded jury trial. The jury found Petitioner guilty of all counts. He was sentenced to a concurrent term of three years by the Honorable M. Joseph Blumenfeld, Judge of the United States District Court at Hartford, Connecticut.

Timely appeal was filed in the United States Court of Appeals for the Second Circuit. The following were the questions presented for the Court's consideration:

1) WHETHER COUNTS I, III, IV, VI AND VIII OF THE INDICTMENT ARE DEFECTIVE IN THAT EACH COUNT CHARGES THE APPELLANT WITH THE SAME OFFENSE OF CONCEALING VARIOUS TYPES OF PROPERTY UNDER TITLE 18, U.S.C.A. §152.

2) WHETHER AN INDICTMENT FOR CONSPIRACY MUST CONTAIN A STATEMENT OF THE FACTS RELIED ON IN CONCISE LANGUAGE WITH AS MUCH CERTAINTY AS THE NATURE OF THE CASE WILL PERMIT.

3) WHETHER COUNTS III AND VII OF THE INDICTMENT ARE DEFECTIVE IN THAT THEY DO NOT IN ANY WAY SET FORTH THE METHOD OF CONCEALMENT OR HOW IT WAS ACCOMPLISHED.

4) WHETHER COUNT III AND VI OF THE INDICTMENT ARE DEFECTIVE IN THAT NO CRIME IS CHARGED.

On these points of law, the United States Court of Appeals for the Second Circuit held that there was no error or accumulation of errors committed which would warrant a reversal (Appendix A).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it involves a direct conflict with a decision of the Court of Appeals in the Ninth Circuit, viz., *Edwards v. United States*, 265 F.2d 302 (9th Cir. 1959).

In its opinion (Appendix A), the United States Court of Appeals for the Second Circuit attempted to distinguish *Edwards*, supra, by holding that "it was not a case where each transfer of money into the bank was treated as a separate offense." In *Edwards*, supra, appellant was found guilty of Count 19 which charged the transferring of a cash register in contemplation of bankruptcy. He was also found guilty of Counts 3, 6, 9, 12, 15, 18 and 20 which charged the concealment of various sums of money on or after May 7, 1953. His sentence on these seven counts was to run concurrently with his sentence on Count 19. The Court found that the eight charges constituted one offense against the appellants and the gist of the offense charged in each of the eight counts against each appellant was the failure of each to reveal or disclose on or after May 7, 1953 property belonging to the bankrupt. The Court at pg. 306 stated:

> ". . . The fact that several different items of property belonging to the estate of a bankrupt were concealed does not multiply the number of offenses even though the concealment of any one of the items standing alone would constitute the offense denounced by the statute."

In the case sub judice, Counts I, III, IV and VII should constitute a single count of the indictment. The four counts allege that between January 1, 1963 and May 1, 1968, Petitioner concealed various articles of personal property. These concealments, although involving different articles of personalty, involve a single continuous transaction, which occurred prior to the filing of the petition in bankruptcy. Since these acts were singular in purpose and occurred prior to the filing of the petition, the rationale of the *Edwards* case, supra, is directly on point.

The offense made punishable under 18 U.S.C.A. §152 is a course of conduct. A reading of the Statute compendiously treats as one offense all violations that arise from that conduct.

The Second Circuit Court of Appeals summarily dismissed appellant's contention upon rationale not in account with reality. The opinion states that since the sentences on each count run concurrently, the only errors which need be considered are those relating to the entire trial and to Count VII, the principal accusation.

The rationale holds the punishment to be the cardinal consideration upon appeal — not the jurisdictional requirement of Counts which are legally sufficient.

Appellant, and all others who are held to answer to a multiple-count indictment, are entitled to have each Count tested for sufficiency. It is a substantive right. Its denial is a substantive wrong.

Appellant stands convicted of eight felonies. These

convictions will follow him for his entire life, even to the traffic courts. A Judge needs no advocate to say he will be more severe on an eight-time felony loser than on a one-time loser.

Where insufficient Counts are allowed to pass on the single-sentence theory (twice asserted in the opinion of the Second Circuit Court), even the inexperienced Jurist appreciates the prejudice to appellant. The cumulative impact upon the Jury is over-powering. The problem of defense is rendered more complex and, the assistance of counsel less effective.

Whether one holds the Congressional law or the Natural law to be Absolute, the *Edwards* case, supra, is more in accord with both systems of law than the opinion appealed from, or the cases cited therein.

Edwards, supra, inherently holds that for a given course of conduct, an accused must be punished. The cases which hold contra to *Edwards*, supra, inherently hold that the prosecution shall make certain the accused is punished. *Edwards*, supra, is in accord with the Christian influence which pervades our laws. The said other authorities are not.

Edwards, supra, stands for the proposition that for one wrong there should be one punishment. Contrary authorities stand for the proposition that Judicial labor shall be saved.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

IRWIN GORDON, In Pro Se
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420 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit was served this 3rd day of August, 1967 upon the following persons by depositing a copy of same addressed to each in the United States Mail with sufficient Air Mail Postage Prepaid:

HONORABLE THURGOOD MARSHALL
Solicitor General
United States Department of Justice
Washington, D. C. 20530
and to
HONORABLE JON NEWMAN
Assistant United States Attorney
United States Department of Justice
460 Main Street
Hartford, Connecticut

IRWIN GORDON, In Pro Se

APPENDIX

In The

SUPREME COURT OF THE UNITED STATES

_____Term, 1967

NO.

IRWIN GORDON,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

Appendix To Petition For A Writ of Certiorari To The United States Court of Appeals For The Second Circuit

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APPENDIX A

OPINION OF SECOND CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 481 — September Term, 1966.
(Argued June 7, 1967 Decided July 5, 1967)
Docket No. 31128

UNITED STATES OF AMERICA,
Appellee,

-vs-

IRWIN GORDON and JOSEPH SCATA,
Appellants.

Before:

MOORE, FRIENDLY AND ANDERSON,
Circuit Judges.

Appeal from a judgment of conviction by the United States District Court for the District of Connecticut of bankruptcy fraud in violation of 18 U.S.C. Section 152 after a trial before M. Joseph Blumenfeld, Judge, and a jury. The appellants Irwin Gordon and Joseph J. Scata attack the sufficiency of the evidence and the form of the indictment.

Affirmed.

IRWIN GORDON, per se

W. PAUL FLYNN, New Haven, Connecticut (Joel N. Lee, Miami Beach, Florida, Kopkind & Flynn, New Haven, Connecticut, on the brief), for the appellant Scata

JON O. NEWMAN, United States Attorney for the District of Connecticut, Hartford, Connecticut, for the appellee.

MOORE, Circuit Judge:

Irwin Gordon and Joseph J. Scata appeal from judgments of conviction for bankruptcy fraud in violation of 18 U.S.C. Section 152 after a trial before a jury. Both appellants attack the form of the indictment and Scata additionally attacks the venue and the sufficiency of the evidence of guilt. We affirm.

The evidence tended to show that Gordon and Scata were, respectively, the president and secretary of a Connecticut corporation which operated retail discount stores in that state including one at Rocky Hill. The Rocky Hill store was opened in September of 1962 and closed in May of the following year. The Connecticut corporation was adjudicated a bankrupt in June and it is in connection with this bankruptcy that fraud is alleged. In January of 1963, the appellants opened another store of a similar nature in Newburgh, New York, which was owned by a separate New York corporation. Beginning at once and continuing with increasing frequency until the closing of

the Rocky Hill store, substantial amounts of merchandise were transferred from Connecticut to New York. In addition, cash arising from the operation of the Connecticut store was transferred to a bank account opened in Newburgh for the use of the Newburgh store. The Trustee in bankruptcy was never told of the bank account.

At the trial, the prosecution offered the expert testimony of two accountants to show the extent of the misappropriation of merchandise. Both testified that the value of merchandise purchased as represented by vouchers less the value of the goods sold as represented by the proceeds appearing in bank statements less the value of goods on hand at the time of bankruptcy left an unexplained absence of over $50,000 worth of merchandise. In this analysis, appellants were given credit for some $24,000 worth of goods which had been shipped to New York but had been paid for by that store.

The evidence also showed that fictitious invoices were prepared to cover a part of the missing inventory but that there were no bank deposits to indicate that payment had been made for the goods covered by these invoices. And under the direction of the appellants, inflated insurance claims were prepared following a minor robbery. In addition, there was a substantial amount of evidence of fraudulent intent which need not be detailed here.

Appellants each raise a number of errors alleged to have been committed below. We have examined each and find that no error or accumulation of errors was committed that would warrant a reversal. Indeed, most of the claims are so lacking in merit that discussion would serve no use-

ful purpose. In any event, since the sentences one each count run concurrently, the only errors which we need consider are those relating to the entire trial and to Count VII, the principal accusation. *Hirabayashi v. United States*, 320 U. S. 81 (1943).

A. THE INDICTMENT

Both appellants were charged in a single, eight-count indictment. No question is raised concerning Counts II and V and they will not be considered further. Counts I and IV charged violations of Section 152, paragraph 1, which relates to concealing assets of the bankrupt's estate from the Trustee. Count IV covered the bank account and Count I covered a truck which belonged to the Rocky Hill store but was removed to New York.

Count III and VI charge violations of Section 152, paragraph 6, which prohibits transferring assets in contemplation of bankruptcy or with an intent to defeat the bankruptcy laws, again by concealing the truck and the bank account.

Count VII charged a violation of paragraph 6 through the transfer of the merchandise and this was the heart of the indictment.

Count VIII charged a conspiracy to violate Section 152, paragraphs 1, 2 and 6, by committing the substantive crimes previously charged and enumerated a variety of overt acts.

Both appellants claim that the failure to consolidate some or all of these counts was reversible error. This argu-

ment has no merit. It is beyond dispute that the separate paragraphs of Section 152 create separate crimes, the violation of which may be indicted separately. See, e.g., *United States v. Schireson*, 116 F.2d 881 (3 Cir. 1940). And it has been held that separate transfers in violation of paragraph 6 constitute separate offenses. *Dranow v. United States*, 307 F.2d 545 (8 Cir. 1962), *United States v. Shapiro*, 101 F.2d 375 (7 Cir. 1939). The only possible error, therefore, was the failure to consolidate Counts I and IV but we are unable to find the slightest prejudice to appellants. This was not a case where each transfer of money into the bank account was treated as a separate offense. See *Edwards v. United States*, 265 F.2d 302 (9 Cir. 1959). And since the sentences of each appellant on each count are to run concurrently, they cannot complain of a failure to consolidate two of the more minor counts of an eight-count indictment.

In any event, appellants have waived their rights to have this question considered on appeal. A pre-trial motion to consolidate was denied on the ground that the resolution of such a motion should be deferred until trial. The motion, however, was not renewed at trial and the appellants proceeded without further objection to this aspect of the indictment.

B. SUFFICIENCY OF THE EVIDENCE.

Appellant Scata asserts that the evidence relating to Count VII, the transferred merchandise, was insufficient in several respects. First, he argues that the government's case was fatally defective because of the inadvertent failure to introduce into evidence the records of the Rocky

Hill store which formed the basis of the expert testimony. As it is not disputed that these records were in court and available to the defense, the most this argument suggests is a formal violation of the best evidence rule. Certainly, if these records had been destroyed, the experts could have testified to their contents. *Corbett v. United States*, 238 F.2d 557 (9 Cir. 1956). Because these records were available to the defense for use in cross-examination or otherwise, appellants cannot demonstrate any possible prejudice requiring reversal.

Second, appellant contends that because it does not appear that all of the corporate records were before the experts, their testimony was incompetent. There is no suggestion that the government suppressed evidence and, in fact, it does not appear to be disputed that the principal reason for the absence of some records was that the appellants failed to produce them in accordance with the Trustee's demand. Nor do we understand the appellants to claim that the absence of some records was necessarily prejudicial to them for they do not contest the assertion of the government that the missing records would be more damning than redeeming to the appellants. We are of the opinion that argumentation concerning any lapses in the government's case and explanations for those lapses, if any, properly would be directed to the jury. It is clear beyond doubt that the government presented adequate evidence of misappropriation of merchandise to go to the jury.

C. VENUE

Scata's attack on the venue is without merit but should be noted. Essentially he argues that the concealment, if

any, occurred in New York. But the crime charged is concealment from the Trustee and the situs of the Trustee is Connecticut. It can scarcely be argued that Scata had no duty to disclose to the Trustee a prior concealment in another state. See, e.g., *United States v. Zimmerman*, 159 F.2d 559 (7 Cir. 1946). The proper venue, therefore, is Connecticut. See also 18 U.S.C. Section 3237.

Affirmed.

APPENDIX B

STATUTORY PROVISION INVOLVED TITLE 18, UNITED STATES CODE, SECTION 152.

"Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshall, or other officer of the court charged with the control or custody of property or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy or attorney, or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the

filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation, or

Whoever after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies or makes a false entry in any document affecting or relating to the property of affairs of a bankrupt; or

Whoever after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshall or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. As amended June 12, 1960, Feb. L. 86-519, S. 2, 74 Stat. 217; Sept. 2, 1960, pub. L. 86-701, 74 Stat. 753.

APPENDIX C

No. 11184 CRIMINAL

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
UNITED STATES OF AMERICA
v.
IRWIN GORDON, NUNZIO SCATA and JOSEPH SCATA

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. On the 8th day of May, 1963, an involuntary petition in bankruptcy was filed in the United States District Court for the District of Connecticut praying that National Furniture & Appliance Stores, Inc., a corporation organized and existing under the laws of the State of Connecticut, with its place of business at 2128 Silas Deane Highway, Rocky Hill, Connecticut, be adjudicated a bankrupt and in pursuance of said petition, the said National Furniture and Appliance Stores, Inc., was, on the 4th day of June, 1963, adjudicated a bankrupt.

2. On the 8th day of May, 1963, the said bankruptcy proceedings was referred to Saul Seidman, the referee in bankruptcy of the aforesaid court, for the further proceedings in accordance with the bankruptcy laws.

3. Therefore, on the 15th day of May, 1963, Sidney Waingrow was appointed Receiver in the aforesaid proceedings and on the 3rd day of July, 1963, Abraham A. Katz was appointed Trustee of the estate of the said bankrupt.

4. During all of the times hereinafter mentioned, IRWIN GORDON, a defendant herein, was the President of the said bankrupt; NUNZIO SCATA, a defendant herein, was the Secretary-Treasurer of the said bankrupt.

5. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc. as a bankrupt, and continuously thereafter until the date upon which the property was discovered, only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said bankruptcy petition, the said bankrupt had substantial property, including, among other things, a 1954 Ford van-type truck, green with a deep blue body with "Lombardi's" painted on the side.

6. On or about the 1st day of May, 1963, the exact date being unknown to the Grand Jurors, and continuously thereafter until the date upon which the property was discovered, in the District of Connecticut, the said National Furniture & Appliance Stores, Inc., a corporation, and IRWIN GORDON, NUNZIO SCATA AND JOSEPH SCATA knowingly and fraudulently did conceal from Sidney Waingrow and Abraham A. Katz, receiver and Trustee respectively, as aforesaid, and from creditors in the said proceedings, property belonging to the estate

of the said bankrupt, consisting of a 1954 Ford van-type truck, green with deep blue body with "Lombardi's" painted on the sides, in that the defendants did during the period aforesaid remove from the foresaid premises of the bankrupt, the said property and did deliver the same to National Discount Stores at 303 Broadway, Newburgh, New York, for the purpose and with the intent of concealing such property.

All in violation of Title 18, United States Code, Section 152.

COUNT TWO

1. The Grand Jury realleges all the allegations of Paragraph 1 to 4, inclusive, of Count One of this indictment.

2. On or about the 7th day of August, 1963, in the District of Connecticut, IRWIN GORDON, knowingly and fraudulently did make a false oath, as to a material matter, and account in, and in relation to, the aforesaid proceeding, in that he filed in the Office of the Clerk of the United States District Court for the District aforesaid, schedules of debts and assets of the said bankrupt, subscribed and sworn to by said IRWIN GORDON, wherein he did make solemn oath that the answers contained therein were true and complete to the best of his knowledge, information and belief, but wherein he did knowingly and fraudulently fail to disclose that among the assets of the said bankrupt was a 1954 Ford van-type truck, green with a deep blue body with "Lombardi's" painted on the sides.

All in violation of Title 18, United States Code, Section 152.

COUNT THREE

1. The Grand Jury realleges all of the allegations of Paragraphs 1 to 5, inclusive, of Count One of the Indictment.

2. On or about the 1st day of March, 1963, the exact date being unknown to the Grand Jurors, in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, as officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceedings by and against the National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer, and conceal property of the said National Furniture & Appliance Stores, Inc., that is, a 1954 Ford van-type truck, green with a deep blue body with "Lombardi's" painted on the sides.

All in violation of Title 18, United States Code, Section 152.

COUNT FOUR

1. The Grand Jury realleges all of the allegations of Paragraphs 1 to 4, inclusive, of Count One of this Indictment.

2. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc., as a bankrupt,

and continuously thereafter until the date upon which the property was discovered, only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said bankruptcy petition, the said bankrupt had substantial property, including, among other things, a bank account in the County National Bank of Newburgh, New York.

3. On or about the 28th day of January, 1963, and continuously thereafter until the date upon which the property was discovered, in the District of Connecticut, the said National Furniture & Appliance Stores, Inc., a corporation, and IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA knowingly and fraudulently did conceal from Sidney Waingrow and Abraham A. Katz, Receiver and Trustee, respectively, as aforesaid, and from creditors in the said proceeding, property belonging to the estate of the said bankrupt, consisting of a bank account in the County National Bank of Newburgh, New York, in that the defendants did during the period aforesaid remove money from the aforesaid premises of the bankrupt, and placed it in the bank account in the County National Bank of Newburgh, New York, for the purposes and with the intent to conceal such property.

All in violation of Title 18, United States Code, Section 152.

COUNT FIVE

1. The Grand Jury realleges all of the allegations of Paragraph 1 to 4, inclusive of Count One of the Indictment.

2. On or about the 7th day of August, 1963, in the District of Connecticut, IRWIN GORDON knowingly and fraudulently did make a false oath, as to a material matter, and account in, and in relation to, the aforesaid bankruptcy proceedings, in that he filed in the Office of the Clerk of the United States District Court for the District aforesaid, schedules of debts and assets of the said bankrupt, subscribed and sworn to by the said IRWIN GORDON, wherein he did make solemn oath that the said answers contained therein were true and complete to the best of his knowledge, information and belief, but wherein he did knowingly and fraudulently fail to disclose that among the assets of said bankrupt was a bank account in the County National Bank of Newburgh, New York.

All in violation of Title 18, United States Code, Section 152.

COUNT SIX

1. The Grand Jury realleges all the allegations of Paragraph 1 to 4, inclusive, of Count One of this indictment.

2. The Grand Jury realleges all the allegations of Paragraph 2 of Count Four of this Indictment.

3. On or about the 28th day of January, 1963, in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceedings by and against the said National Furniture & Appliance Stores,

Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc., that is, they opened a bank account in the County National Bank of Newburgh, New York, and kept funds of the bankrupt corporation therein.

All in violation of Title 18, United States Code, Section 152.

COUNT SEVEN

1. The Grand Jury realleges all the allegations of Paragraphs 1 to 4, inclusive, of Count One of this indictment.

2. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc., a bankrupt, and continuously thereafter only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said bankruptcy petition, the said bankrupt had substantial property, including, among other things, furniture, television and stereo sets, and General Electric heavy electric appliances.

3. From approximately February 1, 1963, until the date of the adjudication of the said National Furniture & Appliance Stores, Inc., as a bankrupt, in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, as officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceedings by and against the said

National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc., that is, items including, among other things, furniture, television and stereo sets, and General Electric heavy electric appliances, the total approximately value of which was between $25,000 and $95,000.

All in violation of Title 18, United States Code, Section 152.

COUNT EIGHT

1. The Grand Jury realleges all the allegations of Paragraph 1 to 4, inclusive, of Count One of the Indictment.

2. Between January 1, 1963 and the date of the adjudication of the said National Furniture & Appliance Stores, Inc., as a bankrupt in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., the bankrupt and the defendants herein, and Paul Scata, Isadore (Sonny) Brickman and Yan Slade, as named herein as co-conspirators but not as defendants, and diverse other persons to the Grand Jury unknown, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, United States Code, Section 152.

3. It was a part of the said conspiracy that the defendants knowingly and fraudulently concealed from

the Receiver and Trustee as aforesaid, and from creditors in the said proceedings, property belonging to the estate of the said bankrupt.

4. It was further a part of the said conspiracy that the defendants knowingly and fraudulently made a false oath as to material matters and accounts in and in relation to the aforesaid bankruptcy proceedings.

5. It was further a part of the said conspiracy that the defendants and co-conspirators as agents and officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceeding by and against the said National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc.

OVERT ACTS

At the time hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about January 28, 1963, a checking account was opened in the name of National Furniture & Appliance Stores, Inc., in the County National Bank in Newburgh, New York, by the defendant, NUNZIO SCATA and JOSEPH J. SCATA.

2. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in

the County National Bank in Newburgh, New York, in the amount of $400 payable to the defendants, NUNZIO SCATA and JOSEPH J. SCATA.

3. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the amount of $900 payable to Sonny Brickman.

4. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the sum of $215 payable to Sonny Brickman.

5. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the sum of $1,500 payable to cash.

6. In March, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the amount of $2,500.00 payable to National Discount Stores.

7. In March, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the amount of $1,000 payable to George Hyman, Attorney for Blue Bell Manufacturing Company.

8. In April, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the

County National Bank in Newburgh, New York, in the amount of $500 payable to George Hyman, Attorney for Blue Bell Manufacturing Company.

9. On or about May 16, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc., account in the County National Bank in Newburgh, New York, in the amount of $464.51 payable to cash and signed by the defendants NUNZIO SCATA and JOSEPH J. SCATA.

10. On or about February 25, 1963, IRWIN GORDON as President, NUNZIO SCATA as Vice President, and JOSEPH J. SCATA, as Secretary Treasurer, formed the National Discount Stores, a corporation organized to do business at 303 Broadway, Newburgh, New York.

11. Sometime in February, 1963, the exact date unknown to the Grand Jury, General Electric Distribution and Sales Operations, represented in Connecticut by Louis Comenk, Supervisor of Sales and Distribution and Ray Winialski, Salesman, sold to the National Furniture & Appliance Stores, Inc., a railroad carload of large electrical appliances, which goods were delivered by General Electric via rail to the public railhead at Wethersfield, Connecticut. Paul Scata, acting as an employee of the National Furniture & Appliance Stores, Inc., and under orders from IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, drove a tractor-trailer load of these appliances direct from the railroad siding in Wethersfield, Connecticut, to the National Discount Stores in Newburgh, New York.

12. On numerous occasions between December, 1962, and April, 1963, the exact dates of which are unknown to

the Grand Jurors, Paul Scata, an employee of the National Furniture & Appliance Stores, Inc., transported truck loads of goods and merchandise from the bankrupt store in Rocky Hill to the National Discount Stores in Newburgh, New York. Goods transported included television and stereo sets, furniture and linoleum. Until late February or early March, he most often drove a 1954 Ford van-type truck with "Lombardi's" painted on its sides.

13. In late February or early March, the exact date being unknown to the Grand Jurors, Paul Scata, an employee of the National Furniture & Appliance Stores, Inc., drove a truck load of goods and merchandise from the bankrupt store in Rocky Hill, Connecticut, to the National Discount Store in Newburgh, New York, in a 1954 Ford van-type truck with "Lombardi's" painted on its sides, under instructions, Paul Scata left the 1954 Ford van-type truck at the National Discount Store at Newburgh, New York, and returned to Connecticut by other means.

14. In late April, 1963, or early May, 1963, the exact dates being unknown to the Grand Jurors, Van Slade who had been the manager of the National Furniture & Appliance Stores, Inc., until April 1963 and was thereafter employed by the National Discount Stores in Newburgh, New York, was instructed by IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA and in fact did prepare fictitious invoices, showing that the value of the goods and merchandise shipped from the National Furniture & Appliance Stores, Inc., in Rocky Hill, Connecticut to National Discount Stores in Newburgh, New York, amount to approximately $47,000.

15. On numerous occasions between December, 1962 and April, 1963, the exact dates of which are unknown to the Grand Jurors, Van Slade, the manager of the National Furniture & Appliance Stores, Inc., under contract from IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, prepared and ordered shipment of goods and merchandise from the National Furniture & Appliance Stores, Inc., in Rocky Hill, Connecticut, to the National Discount Stores in Newburgh, New York, goods and merchandise shipped included furniture, appliances and tires.

17. On or about March 12, 1963, the Detri-Kind Camera, Incorporated, of New York City, sold various items to the National Furniture & Appliance Stores, Inc., with the billing made to the bankrupt company but delivery to the National Discount Stores of Newburgh, Incorporated, Newburgh, New York.

18. On or about March 15, 1963, Enterprise Aluminum Company, of Masillon, Ohio, sold various items of kitchenware to the National Furniture & Appliance Stores, Inc., with the billing made to the bankrupt company but delivery to National Discount Stores of Newburgh, Incorporated, of Newburgh, New York.

19. On or about April 5, 1963, U. S. Continental Sales Corporation of New London, Connecticut, sold linoleum rugs for a total of $1,017 to the National Furniture & Appliance Stores, Inc., with the billing made to the bankrupt company buy delivery to National Discount Stores of Newburgh, Incorporated, of Newburgh, New York.

20. On or about March 29, 1963, Wholesale Tire and Battery Company of Hartford, Connecticut, sold 206 tires at a total value of approximately $3,665.28 to the National Furniture & Appliance Stores, Inc., with delivery made to the bankrupt store at Rocky Hill, Connecticut.

21. On or about November, 1962, the exact date being unknown to the Grand Jurors, IRWIN GORDON purchased a Pontiac Grand Prix which was registered in the name of Mrs. Joseph Scata from Jones Downtown Motors of Hartford, Connecticut, by making a down payment by check on the National Furniture & Appliance Stores, Inc., in the amount of approximately $500, the exact amount being unknown to the Grand Jurors.

22. On or about March 12, 1963, Joseph J. Scata issued a check drawn on the National Furniture & Appliance Stores, Inc., in the amount of $346.20 to Universal C. I. T. as partial payment of a Ford Thunderbird sold by Jones Downtown Motors of Hartford, Connecticut, to Theresa Scata, the wife of Joseph J. Scata.

A TRUE BILL.

_____

FORMAN

/S/ ROBERT C. ZAMPANO
UNITED STATES ATTORNEY

/S/ JOHN D. ADAMS
UNITED STATES ATTORNEY

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 474

IRWIN GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and a co-defendant were convicted in the United States District Court for the District of Connecticut on seven counts charging bankruptcy fraud in violation of 18 U.S.C. 152, and on an eighth count charging conspiracy, in violation of 18 U.S.C. 371. Petitioner was sentenced to imprisonment for three years on each of the eight counts, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

Petitioner does not challenge the sufficiency of the evidence, which is related in some detail in the opinion of the court below. Prior to trial, he moved to

275-628—67

consolidate certain counts of the indictment. The resolution of that motion was deferred to the trial of the cause, but was not then renewed. On appeal, petitioner contended that it was error to fail to consolidate Counts I, III, IV, VI, and VII. The court below suggested that there was "possible error" in failing to consolidate Counts I and IV, which separately charged fraudulent concealment of a bank account and a truck. But the court, even assuming error, could find not the "slightest prejudice", since the sentences on all eight counts are concurrent (Pet. App. A6–7). In addition, the court of appeals held that the failure to renew the consolidation motion at trial, as the pretrial motion judge advised, constituted a waiver of this objection (Pet. App. A7).

The structure of the indictment, which is all petitioner seeks to challenge, demonstrates that there is no occasion for further review. Counts I and IV charged violations of Section 152, paragraph 1, relating to the concealment of assets of the bankrupt's estate from the Trustee. Count I specifically charged the concealment of a truck and Count IV concealment of a bank account (Pet. App. C 13–14, 17).

Counts III and VI charged violations of Section 152, paragraph 6, relating to fraudulent transfer of assets in contemplation of bankruptcy. Count III concerned the transfer of the truck mentioned in Count I, and Count VI concerned the opening of the secret bank account mentioned in Count IV (Pet. App. C 15–16, 18–19).

Count VII, which constituted the principal accusation, charged a violation of paragraph 6 of Section 152 with respect to the transfer of property (other than the truck and the bank account) of a value between $25,000 and $95,000 in contemplation of bankruptcy (Pet. App. C 19–20).[1]

It is clear that Counts III, VI, and VII, alleging separate transfers of different property in contemplation of bankruptcy, charged separate offenses, *Dranow* v. *United States*, 307 F. 2d 545, 559 (C.A. 8). The transfer of property in contemplation of bankruptcy is a different offense from concealment of assets from the trustee or receiver, even if the same property is involved. Hence the offenses charged in Counts III, VI, and VII are different from those charged in Counts I and IV. See *United States* v. *Goodman*, 285 F. 2d 378, 379–380 (C.A. 5), certiorari denied, 366 U.S. 930. As to concealment of assets from the trustee charged in Counts I and IV, it has been held that the statute prohibits a course of conduct, irrespective of the actual number of separate concealments. See *Edwards* v. *United States*, 265 F. 2d 302 (C.A. 9) (involving various transfers of money into a bank account). In light of the concurrent sentences on all counts, even if we assume this doctrine applies to concealing different property in a single scheme, peti-

[1] Count II and Count V charged violations of paragraph 2 of Section 152 in that petitioner made false oaths by wilfully failing to list among the assets of the bankrupt the truck and bank account mentioned (Pet. App. C 14–15, 17–18). Count VIII charged conspiracy (Pet. App. C 20–22).

tioner was not prejudiced by the failure to consolidate Counts I and IV. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Lawn* v. *United States*, 355 U.S. 339, 359.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

SEPTEMBER 1967.

[2] In addition the court below correctly held that, by failing to renew at trial the motion to consolidate these counts, the petitioner waived any objection to their separate status.

U.S. GOVERNMENT PRINTING OFFICE: 1967

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 474

IRWIN GORDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On August 9, 1967, petitioner filed his petition for a writ of certiorari with this Court seeking review of his conviction on eight counts of an indictment charging violations of the bankruptcy laws (18 U.S.C. 152). Our memorandum in opposition was filed on September 8, 1967.

During the pendency of his appeal in the court below, petitioner was enlarged on bail limited to the Southern District of New York, the Southern District

of Florida, and travel points in between. Upon affirmance of the judgment by the court below (neither petitioner nor his counsel appeared at oral argument), the mandate was not stayed, and petitioner made no application in this Court for a stay of mandate. Petitioner failed to surrender himself to the jurisdiction of the court. On September 5, 1967, a bench warrant was issued, but petitioner has not been found. Information has been received that petitioner had fled from the United States and is now in Portugal. In these circumstances, considerations of judicial policy makes it inappropriate for this Court to exercise its discretionary jurisdiction, and therefore the petition for a writ of certiorari should be dismissed. Cf. *Smith* v. *United States*, 94 U.S. 97; *Bonahan* v. *Nebraska*, 125 U.S. 692; *Eisler* v. *United States*, 338 U.S. 189 and 338 U.S. 883.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1967.

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In the

Supreme Court of the United States

October Term, 1967

No. 571

JOSEPH SCATA, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1966

JOSEPH SCATA, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 5, 1967.

OPINION BELOW

The opinion of the Court of Appeals is thus far unreported, and is reprinted in Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under 28 United States Code, Section 1254 (1).

STATUTORY PROVISIONS

The statutes involved are 18 United States Code, Section 152 and 18 United States Code, Section 3237 (a). Appendix B.

STATEMENT OF THE CASE

The defendant, Joseph J. Scata, appeals a conviction upon an indictment charging him with concealing assets of a bankrupt estate, in five Counts, and one Count of conspiracy to conceal.

In late 1962, Irwin Gordon, Nunzio Scata and Joseph Scata associated together in a retail enterprise known as National Furniture and Appliance Stores, Incorporated. The enterprise operated three retail outlets in Connecticut, one in Rocky Hill, Connecticut; one in Southington, Connecticut; and one in Hartford, Connecticut. The Hartford and Southington outlets were doing very poorly so, in early 1963, the officers began to withdraw merchandise from these locations to center it in the Rocky Hill outlet.

Starting in January, 1963, the principals decided to develop the enterprise with a Newburgh, New York store, as well as those in Connecticut. Upon the advice of their accountant, this phase of the operation was incorporated separately under the law of the State of New York, after the store was opened in Newburgh.

Apparently, the retail operation in Newburgh showed evidence of some success; but, the Connecticut operations were on the decline, especially in the Southington and Hartford stores. In an effort to keep the Newburgh operation running, there were a series of deliveries of merchandise from the Con-

necticut stores to the Newburgh store. In some instanecs, the new purchases were paid directly to the vendor by the Newburgh store. In others, there were bills prepared to show the amounts due from the Newburgh account for merchandise transferred from Connecticut. The Connecticut corporation had acquired a Ford truck that was brought to Newburgh, New York, sometime in February of 1963. This truck was appraised for the Trustee at a value of $130.00 It was not listed on the corporation's response to the involuntary petition, signed by Gordon, as a corporate asset. The Trustee testified that no defendant was trying to hide the truck from the Trustee; and, that after Joseph Scata told the Trustees that the truck was an asset of the bankrupt estate, the Trustee and the defendant, Joseph Scata, agreed to its sale for $200.00. A check, in payment, was tendered on November 20, 1963. The check was not deposited for four (4) months and the checking account upon which it was drawn was closed by that time. The check had been held because of other negotiations between the Trustee and the defendant upon other matters involvd in the bankrupt estate. The truck was not concealed or hidden away but was openly in use. The indictment charged Joseph Scata with knowingly delivering this asset to Newburgh, New York, for the purpose of concealment (Count I).

The defendant testified that a bank account has been opened in January, 1963, with a $500.00 deposit in a Newburgh, New York bank. This account was started by a transfer of funds from a Connecticut bank. Thereafter, Scata and his wife, together with his brother and sister-in-law, quaranteed a $15,000.00 loan from a New York bank to finance the Newburgh operation for the bankrupt corporation. Scata covered the final $5,000.00 of that guarantee personally. In addition, Scata advanced $1,000.00 to the Connecticut operation less than 30 days before the involuntary petition was filed.

The primary method of establishing concealment was through two "experts" who were permitted, over objection, to use exhibits for identification as a predicate for a theory of gross purchases, less bank deposits, less direct payment, less merchandise on hand. Exhibits 7 and 8 were never offered as full exhibits. The "experts" testified that they did not know if they had all the records. They did not credit bad debts, returned merchandise, water damaged merchandise, accounts receivable, mysterious disappearance and outright theft, and charges to loan accounts. The two experts indicated differing totals. Rosenquist's opinion showed "concealment of approximately $55,000.00 worth of goods. Farrell, using the same theory, but with a different approach, showed $70,000.00 diverted.

Joseph Scata was convicted by the jury on Counts One, Three, Four, Six, Seven and Eight.

Associate Justice Fortas extended the time to file this Petition to September 3, 1967.

ISSUES PRESENTED

I. The prosecution failed to establish venue.

II. The prosecution failed to prove concealment from the Trustee, because the alleged acts were performed prior to the appointment of a trustee.

III. The testimony admitted with respect to an Exhibit for Identification is reversible error.

ARGUMENT

I. *The Prosecution Failed to Establish Venue*

Title 18 United States Code, Section 3237 (a) permits prosecution of an offense "in any district in which such offense was begun, continued or completed," *provided* the offense was "begun in one district and completed in another, or committed in more than one district."

The question involved in the instant case is whether the alleged concealment began in Connecticut and was completed in New York, or whether the concealment was committed in both Connecticut and New York. Petitioner contends that the only possible conclusion that can be reached is that the alleged concealment did not begin on Connecticut, or, was not committed in New York and Connecticut, thus rendering Section 3237 inapplicable.

All of the evidence with respect to the truck, except delivery from Connecticut, was confined to activity occurring in New York. Similarly, all activity with respect to the bank account, except the transfer of funds from a Connecticut bank, occurred in New York.

Petitioner contends that no offense was committed in Connecticut, because the activity alleged as having occurred in Connecticut was shown to have transpired prior to the appointment of a Trustee. There could not have been a concealment from the Trustee prior to his appointment, *United States v. Schireson*, 116 F.2d 881 (3rd Circuit, 1940); *Edwards v. United States*, 265 F.2d 302 (9th Circuit, 1959). Consequently, the alleged acts of concealment, relevant to the offense charged, could only have been committed in New York. The Connecticut venue was improper, and not within the provisions of Section 3237.

In *United States v. Cores*, 365 United States 405, 407, this Court indicated that statutes determining venue in criminal prosecutions should "respect such considerations" as the Constitutional mandate of prosecution in the district in which the offense was committed, and the hardships entailed in not observing that mandate. And in *United States vs. Johnson*, 323 United States 273, this Court stated at page 276:

"If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it."

The "constitutional policy" underscored by the court, amounts almost to a directive that broad construction be given to statutes of venue, so that, unless a travesty on the statutory language is evident, they should be construed as confining venue to the vicinage. No such liberal interpretation of Section 3237 was given by the Court of Appeals. The latter court acknowledged that "the crime charged is concealment from the Trustee . . ." (See page 3 of the Court's opinion.) And this acknowledgement seemingly reinforced our position that no concealment could have occurred until the Trustee was appointed. However, by the court's opinion, the criminal acts were not to be the basis of venue; rather, the effect of those acts on the Trustee, whose situs was Connecticut, permitted the latter district venue authorized by the statute. Venue has thus been likened to a web, the tentacles of which are capable of reaching into the remotest district and forming the basis of a prosecution. The situs of one affected by the offense as opposed to the situs of the alleged offender, or his alleged criminal activity is the test, according to the opinion below. Petitioner contends that the court below erred in its determination of the considerations involved with respect to proper venue.

II. *The Prosecution Failed to Prove Concealment from the Trustee*

The decision of the Court of Appeals is in conflict with an earlier decision, in the same Circuit, *United States v. Stone*, 282 F.2d 547 (2nd Circuit, 1960) where the court took great care to explain that the defendant could be convicted only if it were shown that he concealed the property, or its proceeds, after the Trustee was appointed. As the court explained in *Stone, supra*, the issue was whether the defendant still had possession of the merchandise or the proceeds on the day the Trustee was appointed. If he didn't, he could not be said to have concealed them.

"It is clear that, if this money had been expended legitimately by the bankrupt before the trustee was appointed, there was and could be no concealment of property which belonged to the bankrupt because at the time the trustee qualified it would not belong to him."

Hersh v. United States, 68 F.2d 799, 804.

The evidence at the trial showed that transfers were made from the Rocky Hill store to the Newburgh store, because the latter was having considerably more success, sales-wise. The cash transferred to the Newburgh store was also intended for use there. The transfer of these items for use by another store, prior to the appointment of the Trustee, cannot be held to be a "concealment." See *United States v. Schireson*, 116 F.2d 881 (3rd Circuit, 1941) where the court said that even if the defendant gave money to a third person, in contemplation of bankruptcy, he would not be guilty of concealment unless the funds were on hand when the point of bankruptcy was reached. So, in the case at bar, there was no evidence that the property allegedly "concealed" was on hand at the time the Trustee was appointed. Absent the proof that the defendant had possession

of the property on the date the Trustee was appointed, he would not have been convicted of "concealing" it.

III. *The Testimony with Respect to an Exhibit for Identification is Reversible Error*

With respect to the "shortages" of merchandise, two "experts" testified that, in their opinion, certain merchandise had not been accounted for on the schedules. The government did not introduce into evidence the records of the Rocky Hill store which formed the basis of the expert testimony. The "expert" testimony should have been excluded, because the basis for the opinion was not in evidence. See *Raub v. Carpenter*, 187 United States 159.

In dismissing this contention, the Court of Appeals, firstly, transformed the claimed error into a claim that the best evidence rule had been violated; and, secondly, excused the "inadvertent" failure to introduce the records into evidence, stating that the records were available in court for use by the defense.

The ruling by the Court of Appeals, on the admissibility of opinion evidence from an exhibit not properly introduced into evidence, was prejudicial error. Cf. *McCormick on Evidence*, Chapter 3, Section 14.

CONCLUSION

For the reasons stated it is respectfully submitted that the court grant this petition.

Respectfully,

W. PAUL FLYNN
FRANK J. RACCIO
Counsel for the Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 481 — September Term, 1966

(Argued June 7, 1967 Decided July 5, 1967)

Docket No. 31128

UNITED STATES OF AMERICA,
Appellee,

v.

IRWIN GORDON AND JOSEPH SCATA,
Appellants.

Before:

MOORE, FRIENDLY AND ANDERSON,
Circuit Judges.

Appeal from a judgment of conviction by the United States District Court for the District of Connecticut of bankruptcy fraud in violation of 18 U.S.C., Section 152 after a trial before M. Joseph Blumenfeld, Judge, and a jury. The appellants Irwin Gordon and Joseph J. Scata attack the sufficiency of the evidence and the form of the indictment.

Affirmed.

IRWIN GORDON, pro se.

W. PAUL FLYNN, New Haven, Connecticut, (Joel N. Lee, Miami Beach, Florida, Kopkind & Flynn, New Haven, Connecticut, on the brief), for the appellant Scata.

JON O. NEWMAN, United States Attorney for the District of Connecticut, Hartford, Connecticut, for the appellee.

MOORE, Circuit Judge:

Irwin Gordon and Joseph J. Scata appeal from judgments of conviction for bankruptcy fraud in violation of 18 U.S.C., Section 152 after a trial before a jury. Both appellants attack the form of the indictment and Scata additionally attacks the venue and the sufficiency of the evidence of guilt. We affirm.

The evidence tended to show that Gordon and Scata were, respectively, the president and secretary of a Connecticut corporation which operated retail discount stores in that state including one at Rocky Hill. The Rocky Hill store was opened in September of 1962 and closed in May of the following year. The Connecticut corporation was adjudicated a bankrupt in June and it is in connection with this bankruptcy that fraud is alleged. In January of 1963, the appellants opened another store of a similar nature in Newburgh, New York, which was owned by a separate New York corporation. Beginning at once and continuously with increasing frequency until the closing of the Rocky Hill store, substantial amounts of merchandise were transferred from Connecticut to New York. In addition,

cash arising from the operation of the Connecticut store was transferred to a bank account opened in Newburgh for the use of the Newburgh store. The Trustee in bankruptcy was never told of the bank account.

At the trial, the prosecution offered the expert testimony of two accountants to show the extent of the misappropriation of merchandise. Both testified that the value of merchandise purchased as represented by vouchers less the value of the goods sold as represented by the proceeds appearing in bank statements less the value of goods on hand at the time of bankruptcy left an unexplained absence of over $50,000 worth of merchandise. In this analysis, appellants were given credit for some $24,000 worth of goods which had been shipped to New York but had been paid for by that store.

The evidence also showed that fictitious invoices were prepared to cover a part of the missing inventory but that there were no bank deposits to indicate that payment had been made for the goods covered by these invoices. And under the direction of the appellants, inflated insurance claims were prepared following a minor robbery. In addition, there was a substantial amount of evidence of fraudulent intent which need not be detailed here.

Appellants each raise a number of errors alleged to have been committed below. We have examined each and find that no error or accumulation of errors was committed that would warrant a reversal. Indeed, most of the claims are so lacking in merit that discussion would serve no useful purpose. In any event, since the sentences on each count run concurrently, the only errors which we need consider are those relating to the entire trial and to Count VII, the principal accusation. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

A. THE INDICTMENT

Both appellants were charged in a single, eight-count indictment. No question is raised concerning Counts II and V and they will not be considered further. Counts I and IV charged violations of Section 152, paragraph 1, which relates to concealing assets of the bankrupt's estate from the Trustee. Count IV covered the bank account and Count I covered a truck which belonged to the Rocky Hill store but was removed to New York.

Counts III and VI charged violations of Section 152, paragraph 6, which prohibits transferring assets in contemplation of bankruptcy or with an intent to defeat the bankruptcy laws, again by concealing the truck and the bank account.

Count VII charged a violation of paragraph 6 through the transfer of the merchandise and this was the heart of the indictment.

Count VIII charged a conspiracy to violate Section 152, paragraphs 1, 2 and 6, by committing the substantive crimes previously charged and enumerated a variety of overt acts.

Both appellants claim that the failure to consolidate some or all of these counts was reversible error. This argument has no merit. It is beyond dispute that the separate paragraphs of Section 152 create separate crimes, the violation of which may be indicted separately. See, e.g., *United States v. Schireson*, 116 F.2d 881 (3 Cir., 1940). And it has been held that separate transfers in violation of paragraph 6 constitute separate offenses. *Dranow v. United States*, 407 F.2d 545 (8 Cir., 1962), *United States v. Shapiro*, 101 F.2d 375 (7 Cir., 1939). The only possible error, therefore, was the failure to consolidate Counts I and IV but we are unable to find the slightest preju-

dice to appellants. This was not a case where each transfer of money into the bank account was treated as a separate offense. See *Edwards v. United States*, 265 F.2d 302 (9 Cir., 1959). And since the sentences of each appellant on each count are to run concurrently, they cannot complain of a failure to consolidate two of the more minor counts of an eight-count indictment.

In any event, appellants have waived their rights to have this question considered on appeal. A pre-trial motion to consolidate was denied on the ground that the resolution of such a motion should be deferred until trial. The motion, however, was not renewed at trial and the appellants proceeded without further objection to this aspect of the indictment.

B. SUFFICIENCY OF THE EVIDENCE

Appellant Scata asserts that the evidence relating to Count VII, the transferred merchandise, was insufficient in several respects. First, he argues that the government's case was fatally defective because of the inadvertent failure to introduce into evidence the records of the Rocky Hill store which formed the basis of the expert testimony. As it is not disputed that these records were in court and available to the defense, the most this argument suggests is a formal violation of the best evidence rule. Certainly, if these records had been destroyed, the experts could have testified to their contents. *Corbett v. United States*, 238 F.2d 557 (9 Cir., 1956). Because these records were available to the defense for use in cross-examination or otherwise, appellants cannot demonstrate any possible prejudice requiring reversal.

Second, appellant contends that because it does not appear that all of the corporate records were before the experts, their

testimony was incompetent. There is no suggestion that the government suppressed evidence and, in fact, it does not appear to be disputed that the principal reason for the absence of some records was that the appellants failed to produce them in accordance with the Trustee's demand. Nor do we understand the appellants to claim that the absence of some records was necessarily prejudicial to them for they do not contest the assertion of the government that the missing records would be more damning than redeeming to the appellants. We are of the opinion that argumentation concerning any lapses in the government's case and explanation for those lapses, if any, properly would be directed to the jury. It is clear beyond doubt that the government presented adequate evidence of misappropriation of merchandise to go to the jury.

C. VENUE

Scata's attack on the venue is without merit but should be noted. Essentially he argues that the concealment, if any, occurred in New York. But the crime charged is concealment from the Trustee and the situs of the Trustee is Connecticut. It can scarcely be argued that Scata had no duty to disclose to the Trustee a prior concealment in another state. See, e.g., *United States v. Zimmerman*, 158 F.2d 559 (7 Cir., 1946). The proper venue, therefore, is Connecticut. See also 18 U.S.C., Section 3237.

Affirmed.

18 *United States Code, Section* 152. Concealment of assets; false oaths and claims, bribery.

Whoever knowingly and fraudulently conceals from the re-

ceiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt, or

Whoever knowingly and fraudulently makes a false oath or accounting or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim on any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt;

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 *United States Code, Section* 3237

A. Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed.

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. On the 8th day of May, 1963, an involuntary petition in bankruptcy was filed in the United States District Court for the District of Connecticut, praying that National Furniture & Appliance Stores, Inc., a corporation organized and existing under the laws of the State of Connecticut, with its place of business at 2128 Silas Deane Highway, Rocky Hill, Connecticut, be adjudicated a bankrupt and in pursuance of said petition, the said National Furniture & Appliance Stores, Inc., was, on the 4th day of June, 1963, adjudicated a bankrupt.

2. On the 8th day of May, 1963, the said bankruptcy proceeding was referred to Saul Seidman, the referee in bankruptcy of the aforesaid court, for the further proceedings in accordance with the bankruptcy laws.

3. Thereafter, on the 15th day of May, 1963, Sidney Waingrow was appointed Receiver in the aforesaid proceedings and on the 3rd day of July, 1963, Abraham A. Katz was appointed Trustee of the estate of the said bankrupt.

4. During all of the times hereinafter mentioned, IRWIN GORDON, a defendant herein, was the President of the said bankrupt; NUNZIO SCATA, a defendant herein, was the Vice President of the said bankrupt; and JOSEPH J. SCATA, a defendant herein, was the Secretary-Treasurer of the said bankrupt.

5. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc. as a bankrupt and continuously thereafter until the date upon which the property was discovered, only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said bankruptcy petition, the said bankrupt had substantial property, including, among other things, a 1954 Ford van-type truck, green with a deep blue body with "Lombardi's" painted on the sides.

6. On or about the 1st day of May, 1963, the exact date being unknown to the Grand Jurors, and continuously thereafter until the date upon which the property was discovered in the District of Connecticut, the said National Furniture & Appliance Stores, Inc., a corporation, and IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, knowingly and

fraudulently did conceal from Sidney Waingrow and Abraham A. Katz, Receiver and Trustee respectively, as aforesaid, and from creditors in the said proceeding, property belonging to the estate of the said bankrupt, consisting of a 1954 Ford van-type truck, green with a deep blue body with "Lombardi's" painted on the sides, in that the defendants did during the period aforesaid remove from the aforesaid premises of the bankrupt, the said property and did deliver the same to National Discount Stores at 303 Broadway, Newburgh, New York, for the purpose and with the intent of concealing such property.

All in violation of Title 18, United States Code, Section 152.

COUNT THREE

1. The Grand Jury realleges all of the allegations of Paragraphs 1 to 5, inclusive, of Count One of this Indictment.

2. On or about the 1st day of March, 1963, the exact date being unknown to the Grand Jurors, in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceeding by and against the National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc., that it, a 1954 van-type truck, green with a deep blue body with "Lombardi's" painted on the sides.

All in violation of Title 18, United States Code, Section 152.

COUNT FOUR

1. The Grand Jury realleges all of the allegations of Paragraphs 1 to 4, inclusive, of Count One of this Indictment.

2. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc. as a bankrupt, and continuously thereafter until the date upon which the property was discovered, only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said bankruptcy petition, the said bankrupt had substantial property, including, among other things, a bank account in the County National Bank of Newburgh, New York.

3. On or about the 28th day of January, 1963 and continuously thereafter until the date upon which the property was discovered, in the District of Connecticut, the said National Furniture & Appliance Stores, Inc., a corporation, and IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA knowingly and fraudulently did conceal from Sidney Waingrow and Abraham A. Katz, Receiver and Trustee respectively, as aforesaid, and from creditors in the said proceeding, property belonging to the estate of the said bankrupt, consisting of a bank account in the County National Bank of Newburgh, New York in that the defendants did during the period aforesaid remove money from the aforesaid premises of the bankrupt, and placed it in the bank account in the County National Bank of Newburgh, New York, for the purpose and with the intent of concealing such property.

All in violation of Title 18, United States Code, Section 152.

COUNT SIX

1. The Grand Jury realleges all the allegations of Paragraphs 1 to 4, inclusive, of Count One of this Indictment.

2. The Grand Jury realleges all the allegations of Paragraph 2 of Count Four of this Indictment.

3. On or about the 28th day of January, 1963, in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceeding by and against the said National Furniture & Appliance Stores, Inc. and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc., that is, they opened a bank account in the County National Bank of Newburgh, New York, and kept funds of the bankrupt corporation therein.

All in violation of Title 18, United States Code, Section 152.

COUNT SEVEN

1. The Grand Jury realleges all the allegations of Paragraphs 1 to 4, inclusive, of Count One of this Indictment.

2. At the time of the adjudication of the said National Furniture & Appliance Stores, Inc. as a bankrupt, and continuously thereafter until the date of the return of this indictment, only a part of the assets have been made available to the officers of the Court, appointed as aforesaid, and to creditors of the said bankrupt, whereas preceding the filing of the said

bankruptcy petition, the said bankrupt had substantial property, including, among other things, furniture, television and stereo sets, and General Electric heavy electric appliances.

3. From approximately February 1, 1963 until the date of the adjudication of the said National Furniture & Appliance Stores, Inc., as a bankrupt, in the District of Connecticut. IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc., that is, items including, among other things, furniture, television and stereo sets, and General Electric heavy electric appliances, the total approximate value of which was between $25,000 and $95,000.

All in violation of Title 18, United States Code, Section 152.

COUNT EIGHT

1. The Grand Jury realleges all the allegations of Paragraphs 1 to 4, inclusive, of Count One of this Indictment.

2. Between January 1, 1963 and the date of the adjudication of the said National Furniture & Appliance Stores, Inc. as a bankrupt in the District of Connecticut, IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA as officers of the National Furniture & Appliance Stores, Inc., the bankrupt and the defendants herein, and Paul Scata, Isadore (Sonny) Brickman and Van Slade, named herein as co-conspirators but not as defendants, and diverse other persons to the Grand Jury unknown, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to violate Title 18, United States Code, Section 152.

3. It was a part of the said conspiracy that the defendants knowingly and fraudulently concealed from the Receiver and Trustee as aforesaid, and from creditors in the said proceeding, property belonging to the estate of the said bankrupt.

4. It was further a part of the said conspiracy that the defendants knowingly and fraudulently made a false oath as to material matters and accounts in and in relation to the aforesaid bankruptcy proceedings.

5. It was further a part of the said conspiracy that the defendants and co-conspirators as agents and officers of the National Furniture & Appliance Stores, Inc., the bankrupt, and in contemplation of a bankruptcy proceeding by and against the said National Furniture & Appliance Stores, Inc., and with intent to defeat the bankruptcy laws, knowingly and fraudulently did transfer and conceal property of the said National Furniture & Appliance Stores, Inc.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about January 28, 1963, a checking account was opened in the name of National Furniture & Appliance Stores, Inc. in the County National Bank in Newburgh, New York, by the defendants, NUNZIO SCATA and JOSEPH J. SCATA.

2. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the amount of $400

payable to the defendants, NUNZIO SCATA and JOSEPH J. SCATA.

3. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the amount of $900 payable to Sonny Brickman.

5. In February, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the sum of $1,500 payable to cash.

6. In March, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the amount of $2,500 payable to National Discount Stores.

7. In March, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the amount of $500 payable to George Hyman, Attorney for Blue Bell Manufacturing Company.

9. On or about May 16, 1963, a check was drawn on the National Furniture & Appliance Stores, Inc. account in the County National Bank in Newburgh, New York, in the amount of $464.51 payable to cash and signed by the defendants NUNZIO SCATA and JOSEPH J. SCATA.

11. Sometime in February, 1963, the exact date being unknown to the Grand Jury, General Electric Distribution and Sales Operations, represented in Connecticut by Louis Comenk, Supervisor of Sales and Distribution and Ray Winialski, Sales-

man, sold to the National Furniture & Appliance Stores, Inc. a railroad carload of large electrical appliances, which goods were delivered by General Electric via rail to the public railhead at Wethersfield, Connecticut. Paul Scata, acting as an employee of the National Furniture & Appliance Stores, Inc. and under orders from IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, drove a tractor-trailer load of these appliances direct from the railroad siding in Wethersfield, Connecticut, to the National Discount Stores in Newburgh, New York.

12. On numerous occasions between December, 1962 and April, 1963, the exact dates of which are unknown to the Grand Jurors, Paul Scata, an employee of the National Furniture & Appliance Stores, Inc., transported truck loads of goods and merchandise from the bankrupt store in Rocky Hill to the National Discount Stores in Newburgh, New York. Goods transported include television and stereo sets, furniture and linoleum. Until late February or early March, he most often drove a 1954 Ford van-type truck with "Lombardi's" painted on its sides.

13. In late February or early March, the exact date being unknown to the Grand Jurors, Paul Scata, an employee of the National Furniture & Appliance Stores, Inc., drove a truck load of goods and merchandise from the bankrupt store in Rocky Hill, Connecticut, to the National Discount Stores in Newburgh, New York, in a 1954 Ford van-type truck with "Lombardi's" painted on its sides. Under instructions, Paul Scata left the 1954 Ford van-type truck at the National Discount Stores store in Newburgh, New York, and returned to Connecticut by other means.

14. In late April, 1963 or early May, 1963, the exact dates

being unknown to the Grand Jurors, Van Slade, who had been the manager of the National Furniture & Appliance Stores, Inc. until April, 1963 and was thereafter employed by the National Discount Stores in Newburgh, New York, was instructed by IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA and in fact did prepare fictitious invoices, showing that the value of the goods and merchandise shipped from the National Furniture & Appliance Stores, Inc. in Rocky Hill, Connecticut to National Discount Stores in Newburgh, New York, amounted to approximately $47,000.

15. On numerous occasions between December, 1962 and April, 1963, the exact dates of which are unknown to the Grand Jurors, Van Slade, the manager of the National Furniture & Appliance Stores, Inc., under orders from IRWIN GORDON, NUNZIO SCATA and JOSEPH J. SCATA, prepared and ordered shipment of goods and merchandise from the National Furniture & Appliance Stores, Inc. in Rocky Hill, Connecticut, to the National Discount Stores in Newburgh, New York. Goods and merchandise shipped included furniture, appliances and tires.

20. On or about March 29, 1963, Wholesale Tire and Battery Company of Hartford, Connecticut, sold 206 tires at a total value of approximately $3,665.28 to the National Furniture & Appliance Stores, Inc. with delivery made to the bankrupt store at Rocky Hill, Connecticut.

A TRUE BILL

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Foreman

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 571

JOSEPH SCATA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1967. On August 9, 1967, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to September 3, 1967. The petition was

filed on September 5, 1967.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported petitioner's conviction for concealing assets of a bankrupt estate from the trustee in bankruptcy.

2. Whether venue was proper.

3. Whether testimony of two government accountants was properly received.

STATUTE INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
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> * * * *
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> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or
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> * * * *

[1] September 3 was a Sunday, September 4 was a holiday.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Connecticut on six counts charging violations of the bankruptcy act and conspiracy. On October 17, 1966, he was sentenced to imprisonment for three years on each count, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

Counts 1 and 4 charged concealment of assets from the trustee in violation of 18 U.S.C. 152, paragraph 1; counts 3, 6 and 7 charged fraudulent transfers in violation of paragraph 6. The government's evidence showed that co-defendant Irwin Gordon [2] was president, and petitioner secretary, of National Furniture and Appliance Stores, a Connecticut corporation operating discount stores at Rocky Hill and other Connecticut locations (Tr. 387, 734-735).[3] In January 1963 Gordon and petitioner opened another discount store in Newburgh, New York, incorporated under the laws of New York as National Discount Stores of Newburgh, New York (Tr. 490). Between January and May 1963, truckloads of merchandise from the

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[2] Irwin Gordon was convicted of the six counts of which petitioner was convicted, together with two other counts charging him with making false oaths in violation of paragraph 2 of Section 152. His petition for a writ of certiorari is pending as No. 474, this Term.

[3] References are to the transcript of trial which has been lodged with the Clerk of this Court.

Rocky Hill store in Connecticut were shipped to the Newburgh store (*e.g.*, Tr. 107-112, 193-200, 287, 297, 364-369, 492). Two accountants, who reconstructed the purchases and sales of the Rocky Hill store, estimated the value of goods shipped to the Newburgh store to be $57,000 and $72,000, respectively (Tr. 45, 328). Count 7 of the indictment charged that this merchandise was fraudulently transferred in contemplation of bankruptcy.

Other evidence showed that a truck belonging to the Rocky Hill store was driven to and used in Newburgh (Tr. 287, 493) and that funds belonging to a bank account of the Rocky Hill store were transferred to a new account in Newburgh (Tr. 386-387). After the Rocky Hill store had been adjudicated a bankrupt, and a trustee had been appointed (Tr. 14-15), neither petitioner nor Gordon disclosed the existence of the truck or the bank account. Counts 1 and 4 charged the concealment of the truck and bank account, respectively, from the trustee, while Counts 3 and 6 charged the fraudulent transfer of the truck and bank account in contemplation of bankruptcy.

ARGUMENT

1. Petitioner contends that, inasmuch as the evidence showed that the truck and bank account were transferred to the Newburgh store prior to the appointment of the trustee, there could be no concealment from the trustee as charged in counts 1 and 4.[4]

[4] Petitioner does not challenge the sufficiency of the evidence establishing his guilty knowledge.

However, it is well established that "concealment", within the meaning of paragraph 1 of Section 152, includes withholding from the trustee knowledge of the existence or whereabouts of assets of the bankrupt estate, *United States* v. *Schireson*, 116 F. 2d 881, 884 (C.A. 3); *Coghlan* v. *United States*, 147 F. 2d 233, 236 (C.A. 8), certiorari denied, 325 U.S. 888, and there is ample evidence that petitioner knowingly withheld knowledge of the existence of the truck and bank account after the appointment of the trustee. See *United States* v. *Shapiro*, 101 F. 2d 375, 378-379 (C.A. 7).[5] In all events, petitioner does not challenge his convictions on counts 3, 6, 7, and 8, any of which completely supports the punishment, since concurrent sentences were imposed. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339.

2. Also without merit is petitioner's contention that venue was improper with respect to counts 1 and 4. The substance of the challenged counts—the withholding of information from the trustee—occurred in the District of Connecticut, the situs of the trustee. Venue was, therefore, properly laid in that district. *United States* v. *Schireson*, 116 F. 2d 881, 884

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[5] *United States* v. *Stone*, 282 F. 2d 547 (C.A. 2), upon which petitioner relies, is not to the contrary. That case held that, in order to establish concealment, it must be shown that the defendant had possession of the assets alleged to have been concealed after the trustee had been appointed. There is ample evidence that petitioner had possession of the truck and bank account after appointment of the trustee, since both assets were in the possession of the Newburgh, New York, corporation of which he was an owner.

(C.A. 3). Moreover, as noted above, the convictions on counts 3, 6, 7, and 8, fully support the sentence.

3. In order to establish the value of the merchandise transferred from the Rocky Hill to the Newburgh store, the two accountants who testified for the government reconstructed the purchases and sales of the Rocky Hill store. As explained in their testimony, they subtracted the volume of sales by that store from the volume of purchases (as reflected by invoices and other records kept by the defendants) to arrive at a figure representing the missing inventory (*e.g.*, Tr. 36-45). These invoices and other records upon which the accountants based their analyses and conclusions were marked for identification (Tr. 18), but were never formally offered and received in evidence. Petitioner's contention that failure to do so constitutes reversible error is without merit. The best-evidence rule does not require that voluminous records which are summarized at trial be formally received in evidence, but only that they "* * * be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available." 4 Wigmore on *Evidence* § 1230 (3rd ed. 1940); see, also, *Greenhill* v. *United States*, 298 F. 2d 405, 412 (C.A. 5), certiorari denied, 371 U.S. 830; *Cabel* v. *United States*, 113 F. 2d 998, 1001 (C.A. 1). The records which the accountants summarized were marked for identification and were available to petitioner for use in cross-examination if he so desired.

Raub v. *Carpenter*, 187 U.S. 159, upon which petitioner relies, requires no different procedure. In that case, this Court merely applied the well established principle that the facts upon which an expert bases his conclusions must be made known to the jury. In the present case, the underlying facts—the volume of purchases and sales made by the Rocky Hill store—were so attested. The experts could, therefore, properly testify to their conclusions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Acting Solicitor General.

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OCTOBER 1967.

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